



Mwangi v Warsan Toyota Garissa & another (Employment and Labour Relations Cause 176 of 2017) [2025] KEELRC 2043 (KLR) (4 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2043 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 176 OF 2017**

**JW KELI, J
JULY 4, 2025**

BETWEEN

PASCALINA NTHENYA MWANGI CLAIMANT

AND

WARSAN TOYOTA GARISSA 1ST RESPONDENT

ZARHA ABDIRAHMAN 2ND RESPONDENT

RULING

1. The court vide its ruling dated 22nd January 2025, reinstated the instant suit at the behest of the claimant. The applicant applied by way of Notice of Motion application dated 3rd March 2025 brought under Rule 74 of the Employment and Labour Relations Court(Procedure) Rules, 2024, seeking the following orders:-
 - a. That this Honourable Court be pleased to review, vary, or set aside its ruling and orders dated 22nd January 2025 reinstating the Claimant's suit, and in lieu thereof, reinstate the initial order dismissing the suit for non-prosecution.
 - b. That this Honourable Court finds that the Claimant, in collusion with her previous and current advocates, deliberately misrepresented material facts to the Court to unfairly obtain reinstatement of her suit.
 - c. That this Honourable Court, in the interests of justice and to deter abuse of the Court process, impose an appropriate penalty for the Claimant's misrepresentation.
 - d. That the costs of this application be borne by the Claimant.



Grounds of the application

2. That while the Claimant's application dated 15th July 2024 was pending determination, the Claimant called the 2nd Respondent/Applicants several times, expressing an alleged intention to settle the matter out of court. The Claimant later approached the 2nd Respondent at the 1st Respondent's offices at Garissa wherein she quoted exorbitant and unreasonable fees that could not be met by the Applicants.
3. That during this engagement, the Claimant stated to have no knowledge of the attempted reinstatement of the case and denied issuing any instructions to her advocate, Lestins & Smith Advocates, in that regard.
4. That despite discussions, the Claimant and our client were unable to reach a settlement and consequently, our client opted to wait for the determination in the Claimant's application for Reinstatement.
5. That at a later date, Our Client/the Applicants indicated that they would like to pursue further negotiations and thus reached out to the Claimant. They agreed to meet voluntarily. Due to proximity, we requested the firm of Nyipolo & Co. Advocates to accompany our client on our behalf and assist in negotiating the terms of settlement in good faith.
6. That despite these renewed efforts to settle, no settlement was reached, as the Claimant proposed an unreasonably high and unjustifiable amount.
7. That soon after the aforementioned failed negotiations, the Applicants herein obtained a letter dated 27th February 2025 from C.P. ONONO & Co. Advocates, the Claimant's alleged former advocates, confirming that they remained fully seized of the matter and actively engaged in it. This letter was addressed to Nyipolo & Co. Advocates, our representative in the attempted negotiations with the Claimant and the said letter directly contradicts the Claimant's earlier assertion that her failure to prosecute the suit was due to negligence or abandonment by her previous advocate.
8. That in light of the foregoing, it is apparent that this Honourable Court was misled by the Claimant into issuing orders for the reinstatement of a suit that was filed nine years ago and dismissed four years ago. The Claimant neglected and/or was not diligent in seeking its reinstatement within a reasonable time.
9. That in her Application dated 15th July 2024, the Claimant misrepresented material facts, specifically as follows:
 - a) The Claimant, in Paragraph (b) of the grounds supporting her Notice of Motion, falsely alleged that she fell out with her advocate, C.P. Onono & Company Advocates.
 - b) In paragraph (c) of her supporting grounds, the Claimant further asserts that she instructed the firm of Lestins & Smith Advocates. However, the letter dated 27th February 2025 clearly indicates that the said firm was appointed by C.P. Onono & Company Advocates for reasons of distance and convenience. It is highly irregular for an advocate to appoint another advocate on behalf of a client, which suggests that this matter is being litigated not by the parties themselves but by their advocates.
 - c) Furthermore, in paragraph (c) of her supporting grounds, the Claimant states that she only became aware that her matter had been dismissed upon engaging Lestins & Smith Advocates. However, the letter dated 27th February 2025, written on the Claimant's instructions, clearly demonstrates that she had always been in contact with C.P. Onono & Company Advocates and was consistently updated on the progress of her case.



- d) In paragraph (d) of her application, the Claimant asserts that she has always been interested in prosecuting the suit but did not receive any communication from C.P. Onono & Company Advocates. This assertion is false, as the letter dated 27th February 2025, written under the Claimant's instructions, categorically confirms that she remained in constant communication with her advocate, Mr. Onono. Therefore, her claim of a lack of communication appears to be a deliberate attempt to mislead this Court into believing there were sufficient grounds for reinstating the suit.
- e) Paragraph (f) of the application is equally misleading. The Claimant alleges that the application was filed without undue delay from the date she instructed her new advocates. However, there was an unjustifiable delay of over four years, despite her being in continuous communication with her former advocates. She was fully aware of the progress (or lack thereof) of her suit and knew that it had been dismissed four years ago.
10. That the application was clearly made in bad faith, an abuse of this Honourable Court and was supported by grounds that were all untrue and misleading, as evidenced by the letter by the Applicant's Counsel on her instructions dated the 27 of February 2025.
11. That subsequently, the Claimant obtained reinstatement of her suit by misleading this Honourable Court into believing that she had been let down by her former advocate. However, the letter from C.P. ONONO & Co. Advocates reveals that her previous advocate remained involved, thereby exposing a deliberate and calculated attempt to mislead the Court, warranting urgent intervention.
12. That the letter further discloses that the only reason the firm of Lestins & Smith Advocates appears on record is due to proximity to the Court and for convenience. This confirms that the Claimant, in collusion with both her former and current advocates, devised a scheme to shift blame to her former advocates to obtain reinstatement of a suit that had been dismissed for want of prosecution in 2019.
13. That in its Ruling dated 22nd January 2025, the Court had already found that the Claimant was guilty of inordinate delay and laches, which would ordinarily bar reinstatement. The only reason the Court exercised its broad equity discretion to reinstate the suit was based on the principle that mistakes of an advocate should not be visited upon a client. The Court observed under Paragraph 12 of its ruling that: "The Court was not satisfied with the reasons for the delay and the non-prosecution and non-attendance to court by the applicant. The applicant was guilty of laches. The Court notwithstanding the foregoing finds that the mistake of the advocate would entitle the applicant to a second opportunity of having her day in court to exercise her constitutional right to hearing."
14. However, with the emergence of new evidence confirming that no such mistake ever existed, the entire basis for the reinstatement collapses.
15. That the Court had also acknowledged that the Claimant made no effort to move the Court since 2019 and only did so after an unexplained five-year delay. The leniency granted by the Court was solely based on the Claimant's false assertion that she had been misled by her former advocate. However, the new evidence establishes that the Claimant remained on good terms with her former advocate, who was/is actively handling the matter. The real cause of the delay was the Claimant's own indifference and lack of diligence coupled with an advocate who intentionally failed to act.
16. That it is now evident that, after several years of neglect and inaction, the Claimant and her former advocates suddenly feigned urgency and "rediscovered" their claim and rights. In a calculated and deceitful maneuver, they rushed to this Honourable Court under the overused pretext of an advocate's mistake for failing to prosecute the case. To bolster this fabricated excuse, the former advocates



strategically appointed a new advocate to advance their deceptive narrative and manipulate the Court into reinstating a suit that had rightly been dismissed.

17. That this discovery of collusion and deliberate misrepresentation calls for firm judicial action. This Honourable Court must not allow litigants and their advocates to abuse its process by misleading it into reinstating cases under false pretenses. There must be consequences for such deception to protect the integrity of the judicial system.
18. That the Applicants have fully satisfied the grounds warranting a review of the ruling dated 22nd January 2025 and thus pray that the orders be granted as sought.
19. That, firstly, there has been the discovery of new and material evidence that was not within the Applicants' knowledge at the time the ruling was delivered, specifically, the letter dated 27th February 2025 from C.P. ONONO & Co. Advocates. This letter confirms that the Claimant's former advocate remained actively involved in the matter and that the excuse of an advocate's mistake was a deliberate misrepresentation to this Honourable Court.
20. That secondly, there exists an apparent error on the face of the record, as the ruling was premised on the mistaken belief that the Claimant had been abandoned by her previous advocate. Since this has now been proven false, it is in the interest of justice that the ruling be reviewed to prevent further abuse of the Court process and to deter litigants from engaging in deception to obtain favorable orders.
21. That this Application is made in good faith, without unreasonable delay, and in the interests of justice.
22. That it is in the interests of justice that this Honourable Court grants the orders sought.
23. The application was supported by the affidavit sworn by Zahra Abdirahman reiterating same grounds and annexing a copy of a letter dated 27th February 2025 as evidence that the former advocates on record for the claimant, C.P. Onono & Co Advocates, were fully seized of the matter and had been actively engaged in the case contrary to the claimant's representation to the court that her failure to prosecute the matter was due to her former advocate's negligence.
24. The respondent filed affidavit dated 17th March 2025 where she stated as follows:- That the Supporting Affidavit sworn by one Ms. Zahra Abdirahman, acknowledges professional misconduct by the firm of Garane & Somane Advocates, by attempting to lure the Respondent out of court negotiations, when they knew very well that she had representation on record. THAT she was a stranger to annexure marked as AA-1 alleged to have been done on her behalf by the firm of C. P. Onono & Company Advocates as the said firm is no longer on record having duly been notified Vide Notice of Change dated 15th July 2024 and served on them on 16th July 2024. (PNM-1) That the alleged letter marked as AA-1, has been prepared by, and addressed to, advocates who are neither parties to this claim, nor on record for any party in this claim, thus irrelevant to this claim. That the Respondents seek review on the ground that she orchestrated a collusion between her previous advocate and current advocate on record to misrepresent material facts to the Court, which allegation cannot be further from the truth and in fact said in bad faith noting the attempt by the Respondents to engage her directly knowing she was represented, which is admitted in paragraph 5, 6 and 7 of the affidavit in support.
25. The Respondent asserted that she was ready to prosecute the suit herein but also ready to appear in Court on the Mention date on 19th March 2025, to confirm to Court that she had fully and solely instructed the firm of Lestins & Smith Advocates to represent in the suit herein. That her advocates had advised that at the earliest opportune time, they will be seeking leave of the Court to cross examine the 2nd Applicant on the contents of her Supporting Affidavit.



26. The applicant filed supplementary affidavit dated 11th April 2025 in response to the replying affidavit of the claimant and stated, inter alia, that it was the claimant who visited their offices at Garissa seeking for out of out-of-court settlement and on the negotiations failing, the claimant instructed her former advocates to issue threats.
27. The application was canvassed by way of written submissions filed by both parties.

Decision

28. The application was hinged on Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024 to wit:- '74. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

Review.

- (a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.”
29. On the 16th July 2024 the claimant filed notice of change of advocate dated 15th July 2024 stating as follows:- ‘notice Of Change Of Advocate Take Notice That Pascalina Nthenya Mwangi, the Claimant herein has appointed the firm of M/s Lestins & Smith Advocates, View Park Towers, 12th Floor, Monrovia Street, Utalii Lane, And P.o. Box 12262-00100 Nairobi. Email: info@lestinsandsmith.co.ke or lestinsandsmith@gmail.com to act for her in this Cause in the Place of the firm of M/s C.p. Onono & Company Advocates, Jihan Centre, 1st Floor, P.o. Box 1211-70100 Garissa. Further Take Notice that all future correspondences herein regarding the Claimant should be addressed to the above address. Dated At Nairobi this 15th day of July 2024.’”The copy of the letter relied on as basis of the application for review of the ruling of the court was dated 27th February 2025. The letter was authored by C.P Onono for C.P Onono & Co Advocates and addressed to Nyipolo & Co. Advocates. The advocates on record for the respondent are Garane and Somane Advocates. The letter was copied to the claimant and her current advocates. The letter stated as follows:- ‘Nyipolo & Co. Advocates Garissa.

This is the Exhibit Marked "AA-I

Attn.: Edwin Nyipolo Advocate

of Zahra Alod Sworn/Declared Before me this 380 day of March 20.25 Nairobi

Dear Sirs,

Commissioner for Oaths

RE: Pascalina Nthenya Versus Warsan Toyota

Our client Pascalina stormed our office yesterday in anger. That is what forced us to call you yesterday (26/2/2025) afternoon and you will remember that she also spoke with you through our mobile. Her complaints were as follows;-



That she was being harassed by telephone calls from a representative of the defendant in the case pending before the ELR Court in Nairobi.

That although Toyota is fully aware that she is represented in that case she was alarmed as to why she was being contacted and telephoned directly.

That when she was called and picked up yesterday she was told that she was being brought to our chambers for discussions only for her to be brought to your chambers. The writer was at the time present and available in the office.

For the record we are and continue to be fully seized of this matter. It is only because of distance and convenience that Lestins & Smith Advocates (Attn:Collins Ouma Mbanda Advocate) of Anniversary Towers, Nairobi appear in the proceedings before the court. That, however, does not and will not excuse the clandestine overtures made by Toyota directly to our client without our knowledge. Our client felt that she was being tricked and pressured into a situation in order to compromise her position and her right to compensation commensurate with the way she was targeted during a very vulnerable period in her life after she had just returned from confinement.

We conclude by saying as follows:-

If the sustained overtures which our client was complaining about were genuine with an honest desire to engage in a proper ADA process then such overtures should have been put down in writing and addressed to us directly. If that was done we would have considered the proposal and, if proper, we would thereafter have engaged in structured negotiations for compensation based on current rates of compensation for identical circumstances.

In the meantime our client is a no-go zone.

Yours faithfully, for C. P. Onono & Co. Advocates

C. P. Onono

Cc: 1.Lestin & Smith Advocates

Attn: Collins O. Mbanda Advocate. Email- cmbanda7@gmail.com

Pascalina Nthenya-Whatsapp No. 0721-774-213” The applicant asserts that the content of the letter disclosed that the claimant and the former advocate Onono had not fallen out and the claimant had misled the court to have the suit reinstated. The applicant relied on the decision in Vehicle and Equipment Leasing Ltd v Jamiu Boara Bank Limited (2018) EKLRR to wit : -“Should the Court of now shut its eyes on such a matter and let the Defendant continue benefiting from a ruling that was obtained through misleading the Court and unjustly? I find the Court that would so, would be abdicating from its duty to give justice to all irrespective of their status as enshrined in Article 159(2) of *the constitution* of Kenya 2010. I have no hesitation to state that Court of law is are required to do substantive justice to all litigants. This Court has jurisdiction and power in execution of its duty to correct and revisit any injustice caused by an earlier on order or ruling of the Court. A party should not be subjected to a ruling that has been obtained either through non-disclosure of material facts or through misleading the Court. It is Court’s duty to ensure that its jurisprudence stands on proper facts and the application of law on the correct facts short of that there would be no justice...” The court finds that the communication, letter by Onono Advocate, was between strangers in the suit. The claimant having filed notice of change of advocates on the 16th July 2024 , anything done by her former advocates post the notice



of change is of no consequence to the suit. The said advocates are strangers to the suit. The allegation that Nyapolo Advocates were instructed by advocates for the applicant was hearsay. Consequently, the contents of the said letter have no relevance to this suit. The letter was written post the ruling of the court of 22nd January 2025. For the reason that the letter was not addressed to the advocates on record of the applicant and was written post the ruling date of impugned ruling, the court on balance of probabilities is not persuaded to find that the claimant misled it to obtain the reinstatement. The principles of reinstatement of the suit had not been shaken by the said letter produced as new evidence for the reasons stated above. (Mbogo and anor v Shah, 1968, EA). On a balance of probabilities I am not persuaded to interfere with my ruling of 22nd January 2025.

30. The application is dismissed with costs to the claimant in cause.
31. Mention to confirm compliance with ruling of 22nd January 2025 and for further directions in the matter on the 29th July 2025.
32. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Claimant –Ms Mwangi

Respondent: Ali Ahmed

